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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 17

IDEAL FARMS, INC. and FRANKLIN LAKES DAIRY PRODUCERS, INC., *Petitioners*

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF IN SUPPORT OF THE PETITION

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Respondent in his Brief in Opposition to the certiorari lays stress on certain cases which he argues support the decisions of the Courts below in this action. Petitioners contend that the arguments and applicability of the cited

cases are neither in point nor even analogous to the question presented by this action.

Respondent's assertion that Petitioners based their contention almost entirely on the fact that an Order may be formulated "only in terms of milk 'purchased' by handlers" is an inaccurate statement.[1] Petitioners complaint is to pricing provisions which are based upon milk *not* purchased, the effect of which obliges Petitioners to pay money into the Producer Settlement Fund for distribution to producers other than themselves.[2] To date the money thus exacted from Petitioners totals more than $137,075.49. With respect to every other aspect of the Order Petitioners are in compliance and are not here questioning their validity. However, the requirement that Petitioners pay monies to the Market Administrator for the Producer Settlement Fund is a pricing provision and as such must find its authority in Section 8c(5)[3] of the Act.[4] It is in Section 8c(5) that the Congress clearly indicated its intention to restrict pricing provisions to that milk purchased. A clearer expression of intention is not possible.

The cases relied on by the courts below and by the Respondent fall basically into two categories: first, there is a line of cases which concededly ascribes a broad interpretation to the word "purchased" as used in this statute. The case of *United States v. Rock Royal Cooperative*[5] held *inter alia* that a cooperative entity acting as an agency for its members individual farmers, must for purposes of the Act be regarded as having purchased the milk it handled and marketed for its members. The case involved the contention by an agency type cooperative that it was

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[1] Resp. Br. 8.

[2] 7 C.F.R. 927.65.

[3] 7 U.S.C. 608c(5)(A).

[4] Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*

[5] *United States v. Rock Royal, Cooperative, Inc.*, 307 U.S. 533, 59 S. Ct. 933, 83 L. Ed. 1446 (1939) (Resp. Br. 9).

not liable to pay a pool obligation into the administrative fund or to meet the expenses of administration. The reason asserted for its freedom from liability was that it was a cooperative composed of producers and distributed the milk of its members and others as agent. Mr. Justice Reed reasoned:

> "It is obvious that the use of the word 'purchase' in the Act, § 8c(5)(A) and (C), would not exclude the 'sale' type of cooperative. When § 8c(5)(F) was drawn, however, it was made to apply to both the 'sale' and 'agency' type without distinction. This would indicate there had been no intention to distinguish between the two types by (A) and (C)."

The Court held that the cooperative must, because of this explicit wording of the statute, contribute to the fund. Note this important language used by Mr. Justice Reed at page 571:

> "Payments into and withdrawals from this fund depend upon the 'value' of the milk received which is fixed by the Order at different prices governed by the use made by the handler of the *purchased* milk . . . " (Emphasis added).

and at page 581:

> "As the cooperative *does not have its own farm* but is itself a handler under the Act, it must pay into the producer settlement fund." (Emphasis added.)

Clearly the Court attached significance to the word "purchased" (there used in the Order). The above quoted language shows that the Court based its opinion that the Cooperative must pay into the Producer Settlement Fund upon the fact that the Cooperative *did not have its own farms*. In the instant case, Petitioners have and operate their own farms and herds. The milk produced by them is never sold, transferred or consigned to anyone else until finally sold to the consumer.

Respondent relies similarly on the case of *Elm Spring Farm v. United States.*[6] In the *Elm Spring* case, a cooperative, organized by officers and stockholders of a pre-existing corporation engaged in handling milk, took over the business of the pre-existing corporation. The cooperative then took title to cattle (but not possession) from farmers, giving back mortgages and other contracts providing for short notice cancellation and recision of the transactions. The Court examined all the intricacies of the various agreements and the identity of the parties, and determined that the cooperative's arrangement was nothing more than a device to avoid subjection to the Milk Marketing Order. See the Court's language at pages 926 and 927:

> "We agree with the district court that Cooperative is not a 'producer' and that the milk received from its so-called 'herdsmen' is not milk of its 'own farm production' as those terms are used in the Order.
>
> "If Cooperative had had the straightforward purpose of becoming a producer of milk it would hardly have negotiated the rather weird series of agreements previously summarized in this opinion. . . .
>
> "In effect what Cooperative did was to say to the farmers: 'If you will become a party to this elaborate camouflage we will pay you 23¢ a hundredweight more than the blended price for your milk'. . . .
>
> "Cooperative might have become a producer by acquiring a farm and milk cows and going into the business of operating a dairy farm with the attendant risks of loss. 'It chose to employ the scheme in question here. It considered it advantageous to avoid the risks of production and now must bear the burdens of a determination that other entities than itself are the producers.'"

It is important to note here that many years ago—long before the attempted regulation of producer-distributors—Petitioners in the instant case did the very things the Court

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[6] *Elm Spring Farm v. United States*, 127 F. 2d 920 C. A. 1 (1942) (Resp. Br. 10).

determined Elm Spring Farm had not done. Petitioners are in fact producers operating their dairy farms with all the risks of loss normally attendant to farm operation. The decision in the *Elm Spring* case was based upon the factual determination that the cooperative was NOT the producer. There is no such contention in the present case.

Finally, the Respondent suggests that support for his position is found in the case of *Shawangunk Cooperative Dairies, Inc. v. Jones.*[7] The *Shawangunk* action, like the *Elm Spring* case, *supra*, involved milk determined by the Court not to have been own farm production. Meadow Valley Farms, Inc., a corporate handler, ceased to operate its plant but arranged for delivery of its producer milk supplies to Shawangunk, a cooperative and a handler under the Order. The arrangement was represented as temporary, but after four months it was determined not to be a temporary arrangement. Assessments were then made against Shawangunk for contribution to the producer settlement fund. Shawangunk argued that it was a gratuitous bailee which did not purchase the milk. The Court concluded that Meadow Valley was to be regarded as the producer's agent to deliver the milk to a handler (Shawangunk), who was subject to the regulations of the Order. In this posture, the cooperative stood in the same position as the cooperatives in the *Elm Spring* and *Rock Royal* cases. Similarly, the decision here followed the decisions of those cases. In all three cases the principals were found to have "received" or "acquired for marketing" from other persons the milk on which the assessments had been made. The words "received" and "acquired for marketing" from another person or entity were equated with the word "purchased". The essential finding in each of the three cases was that the milk handled was not produced by those against whom the assessments were made.

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[7] *Shawangunk Cooperative Dairies v. Jones, et al.*, 153 F. 2d 700, C. A. 2 (1946) (Resp. Br. 10).

Consonant with these decisions is the opinion of the late Chief Judge Learned Hand of the Second Circuit in the case of *Dairymen's League Cooperative Association v. Brannan.*[8] In that case, the obligation to the Producer Settlement Fund depended upon whether certain milk was to be classified as II-A or III-D. To be classified as III-D, milk in the form of cream had to be delivered as cream to a "purchaser" of a certain type. To be classified as II-A, it had to be delivered to a "purchaser" of another type.

The facts were as follows: the Plaintiff owned two "country plants" where it made milk owned by it into cream. The Plaintiff then moved the cream from these two plants located in New York State to another plant owned by the Plaintiff in Newark, New Jersey. At this second plant, the Plaintiff sold the cream to other handlers. The question then arose as to when the first purchase of this cream took place. The Plaintiff contended that under the *Rock Royal* case, which interpreted the word "purchased" to mean "acquired for marketing", the first sale (purchase) took place when the Plaintiff moved *the milk from its "country plants" to its Newark plant.* The Government contended that the first sale took place when the Newark plant sold the milk to another handler. The Plaintiff's contention would have lowered its obligation to the Producer Settlement Fund, whereas the Government's contention would have increased the Plaintiff's obligation to the Producer Settlement Fund. The United States District Court held that the movement of the milk from the "country plants" of the Plaintiff to its Newark plant did not constitute a "sale" or a "purchase" or an "acquisition for marketing". The Plaintiff appealed. The Court of Appeals for the Second Circuit affirmed the lower court, stating:

> "The plaintiff first argues that its delivery to its Newark 'plant' was a purchase, for which it relies upon

[8] *Dairymen's League Cooperative Association v. Brannan*, 173 F. 2d 57, C. A. 2 (1949), cert. denied, 338 U.S. 825, 94 L. Ed. 501.

> a remark of Reed, J., in United States v. Rock Royal Co-operative, Inc. that 'purchased' means 'acquired for marketing'. That was said in discussing sales of milk by 'producers' to their cooperative, as to which the Act was explicit; it was not intended as a general definition, and to use it in interpreting III-D would unduly expand the court's meaning. * * * Since the first 'plant' was the two 'country plants' and there was no sale from them, we need consider only the proper classification at the plaintiff's Newark 'plant'. * * * "

Consideration of the facts of these cases necessarily leads to the conclusion that the decisions were adopted to preclude the use of any device or scheme to circumvent the clear intention of the Act, i.e., that milk handled between producers and handlers should be priced by the Marketing Order. It is submitted, however, that for the Court to have decided that "milk purchased" means "milk not purchased" is not only judicial legislation but in fact contravenes the express intention of the Congress of the United States in the passage of this Act.

The other line of case law depended upon by the Respondent is exemplified by only one case, a District Court case in California, *Acme Breweries v. Brannan*.[9] The latter case does in fact involve a producer who is also a handler; however, the part of this Act applicable to Acme Breweries, who raised and distributed hops, is essentially different than that applicable to milk.[10] The production

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[9] *Acme Breweries v. Brannan*, 109 F. Supp. 116. (Resp. Br. 11).

[10] The Agricultural Marketing Agreement Act provides for marketing orders of various products and there are substantial variances in the methods of regulation authorized by the Act. Of the 58 paragraphs appearing in 8c of the Act, 24 are *specific prescriptions* of regulations for *specific products* and not of general application.

Reference in Section 8c(5) is made repeatedly to "milk purchased" [Sections 8c(5)(A), (C), and (E)]. But note the author-

and distribution of hops was expressly intended by the Congress to be *limited*, when necessary, to achieve price and industry stabilization.

Acme argued that it was not a handler, but an ultimate consumer, and therefore, was not subject to regulation under the Act. The Court held to the contrary. No such contention is made by Petitioners in this case. It has been conceded since the inception of these proceedings that Petitioners are "handlers" within the intendment of the Order (since they have proper health approval), and beyond this point the two cases bear no analogy at all. The Act clearly gives authority to control or limit the total quantity of hops handled by any handler who produces his own hops. On the contrary, there is no authority in the Act to price or limit quantities of milk handled. No authority is granted except to price milk purchased.

In the case of *Benson v. Vance* [11] the Court held as follows:

> "It would be difficult to apply a definition to the word 'purchaser' which would imply that one can purchase anything from himself. Such a definition would rise to an absurdity. If one produces an article, it is

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ity to regulate other products "purchased or handled" in Section 8c(6):

> (B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler *may purchase* from or *handle* on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be *purchased*, or *handled* during any specified period or periods shall be apportioned equitably among producers." (Emphasis added).

[11] *Benson v. L. B. Vance, et al.* (Civil No. 1495, S.D. Miss., May 14, 1960), appeal pending *sub nom: Freeman v. L. B. Vance, et al.* (No. 18,731, C.A. 5).

> his without purchase and a fair definition of 'purchase' may be found in the case of U.S. v. Scovil, 348 U.S. 218."

See also the language of the Court in the case of *Bowles, Administrator, v. Nelson-Ricks Creamery Co.*,[12] a case arising under the Emergency Price Control Act of 1942:

> "(c)(1) Defines a 'Primary Wholesaler' as a person who purchases or receives cheese from two or more cheese factories or cheese makers. Can it be said that the defendant in taking its own cheese from its own factories and storing it in its own warehouse purchased or received the cheese in question? Purchase means 'acquisition by giving an equivalent in money or other exchange value.' 'That which is bought with money.' Receive means 'To get as a result of delivery, transmission or collection.' *It would be a very strained construction to say that you can purchase from yourself or that you can receive from yourself.* (Emphasis added.)

For the foregoing reasons and for those reasons heretofore stated in the Petition for Writ of Certiorari, it is respectfully submitted that the Petition should be granted.

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August, 1961

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[12] *Bowles, Administrator v. Nelson-Ricks Creamery Co.*, 66 F. Supp. 885.